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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

FINJAN, INC.,

Plaintiff,

v.

ZSCALER, INC.,

Defendant.

Case No.: 3:17-cv-06946-JST

**AMENDED STIPULATED
PROTECTIVE ORDER**

1. **PURPOSES AND LIMITATIONS**

Disclosure and discovery activity in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation may be warranted. This Order does not confer blanket protections on all disclosures or responses to discovery and the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles. As set forth

1 in Section 14.4 below, this Protective Order does not entitle the Parties to file confidential
2 information under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed and
3 the standards that will be applied when a party seeks permission from the court to file material
4 under seal.

5 2. DEFINITIONS

6 2.1 Challenging Party: a Party or Non-Party that challenges the designation of
7 information or items under this Order.

8 2.2 “CONFIDENTIAL” Information or Items: information (regardless of how it is
9 generated, stored or maintained) or tangible things that qualify for protection under Federal Rule
10 of Civil Procedure 26(c).

11 2.3 Counsel (without qualifier): Outside Counsel of Record and House Counsel (as
12 well as their support staff).

13 2.4 Designated House Counsel: House Counsel who seek access to “HIGHLY
14 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information in this matter.

15 2.5 Designating Party: a Party or Non-Party that designates information or items that it
16 produces in disclosures or in responses to discovery as “CONFIDENTIAL,” “HIGHLY
17 CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE
18 CODE.”

19 2.6 Disclosure or Discovery Material: all items or information, regardless of the
20 medium or manner in which it is generated, stored, or maintained (including, among other things,
21 testimony, transcripts, and tangible things), that are produced or generated in disclosures or
22 responses to discovery in this matter.

23 2.7 Expert: a person with specialized knowledge or experience in a matter pertinent to
24 the litigation who (1) has been retained by a Party or its counsel to serve as an expert witness or
25 as a consultant in this action, (2) is not a past or current employee of a Party or of a Party’s
26 competitor within the past 4 years, and (3) at the time of retention, is not anticipated to become an
27 employee of a Party or of a Party’s competitor.
28

1 2.8 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Information or
2 Items: extremely sensitive “Confidential Information or Items,” disclosure of which to another
3 Party or Non-Party would create a substantial risk of serious harm that could not be avoided by
4 less restrictive means.

5 2.9 “HIGHLY CONFIDENTIAL – SOURCE CODE” Information or Items: shall
6 mean non-public computer instructions, data structures, and data definitions expressed in a form
7 suitable for input to an assembler, compiler, translator, or other data processing module, and
8 associated comments and revision histories.

9 2.10 House Counsel: attorneys who are employees of a party to this action. House
10 Counsel does not include Outside Counsel of Record or any other outside counsel.

11 2.11 Non-Party: any natural person, partnership, corporation, association, or other legal
12 entity not named as a Party to this action.

13 2.12 Outside Counsel of Record: attorneys who are not employees of a party to this
14 action but are retained to represent or advise a party to this action and have appeared in this action
15 on behalf of that party or are affiliated with a law firm which has appeared on behalf of that party.

16 2.13 Party: any party to this action, including all of its officers, directors, employees,
17 consultants, retained experts, and Outside Counsel of Record (and their support staffs).

18 2.14 Producing Party: a Party or Non-Party that produces Disclosure or Discovery
19 Material in this action.

20 2.15 Professional Vendors: persons or entities that provide litigation support services
21 (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and
22 organizing, storing, or retrieving data in any form or medium) and their employees and
23 subcontractors.

24 2.16 Protected Material: any Disclosure or Discovery Material that is designated as
25 “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or
26 “HIGHLY CONFIDENTIAL – SOURCE CODE.”

27 2.17 Receiving Party: a Party that receives Disclosure or Discovery Material from a
28 Producing Party.

1 3. SCOPE

2 The protections conferred by this Order cover not only Protected Material (as defined
3 above), but also (1) any information copied or extracted from Protected Material; (2) all copies,
4 excerpts, summaries, or compilations of Protected Material; and (3) any testimony, conversations,
5 or presentations by Parties or their Counsel that might reveal Protected Material. However, the
6 protections conferred by this Order do not cover the following information: (a) any information
7 that is in the public domain at the time of disclosure to a Receiving Party or becomes part of the
8 public domain after its disclosure to a Receiving Party as a result of publication not involving a
9 violation of this Order, including becoming part of the public record through trial or otherwise;
10 and (b) any information known to the Receiving Party prior to the disclosure or obtained by the
11 Receiving Party after the disclosure from a source who obtained the information lawfully and
12 under no obligation of confidentiality to the Designating Party. Any use of Protected Material at
13 trial shall be governed by a separate agreement or order.

14 4. DURATION

15 Even after final disposition of this litigation, the confidentiality obligations imposed by
16 this Order shall remain in effect until a Designating Party agrees otherwise in writing or a court
17 order otherwise directs. Final disposition shall be deemed to be the later of (1) dismissal of all
18 claims and defenses in this action, with or without prejudice; and (2) final judgment herein after
19 the completion and exhaustion of all appeals, rehearings, remands, trials, or reviews of this action,
20 including the time limits for filing any motions or applications for extension of time pursuant to
21 applicable law.

22 5. DESIGNATING PROTECTED MATERIAL

23 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party
24 or Non-Party that designates information or items for protection under this Order must take care
25 to limit any such designation to specific material that qualifies under the appropriate standards.
26 To the extent it is practical to do so, the Designating Party must designate for protection only
27 those parts of material, documents, items, or oral or written communications that qualify – so that
28 other portions of the material, documents, items, or communications for which protection is not

1 warranted are not swept unjustifiably within the ambit of this Order.

2 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
3 shown to be clearly unjustified or that have been made for an improper purpose (e.g., to
4 unnecessarily encumber or retard the case development process or to impose unnecessary
5 expenses and burdens on other parties) expose the Designating Party to sanctions.

6 If it comes to a Designating Party's attention that information or items that it designated
7 for protection do not qualify for protection at all or do not qualify for the level of protection
8 initially asserted, that Designating Party must promptly notify all other Parties that it is
9 withdrawing the mistaken designation.

10 5.2 Manner and Timing of Designations. Except as otherwise provided in this Order
11 (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered,
12 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so
13 designated before the material is disclosed or produced.

14 Designation in conformity with this Order requires:

15 (a) for information in documentary form (e.g., paper or electronic documents, but
16 excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing
17 Party affix the legend "CONFIDENTIAL," "HIGHLY CONFIDENTIAL – ATTORNEYS'
18 EYES ONLY," or "HIGHLY CONFIDENTIAL – SOURCE CODE" to each page that contains
19 protected material.

20 A Party or Non-Party that makes original documents or materials available for inspection
21 need not designate them for protection until after the inspecting Party has indicated which
22 material it would like copied and produced. During the inspection and before the designation, all
23 of the material made available for inspection shall be deemed "HIGHLY CONFIDENTIAL –
24 ATTORNEYS' EYES ONLY." After the inspecting Party has identified the documents it wants
25 copied and produced, the Producing Party must determine which documents, or portions thereof,
26 qualify for protection under this Order. Then, before producing the specified documents, the
27 Producing Party must affix the appropriate legend ("CONFIDENTIAL," "HIGHLY
28 CONFIDENTIAL – ATTORNEYS' EYES ONLY," or "HIGHLY CONFIDENTIAL – SOURCE

1 CODE”) to each page that contains Protected Material.

2 (b) for testimony given in deposition or in other pretrial or trial proceedings, that the
3 Designating Party identify on the record, before the close of the deposition, hearing, or other
4 proceeding, or within 21 days thereafter in a written notice to the other Party, during which
5 time—absent agreement otherwise by the Parties—any transcript shall be treated as if designated
6 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” all protected testimony and
7 specify the level of protection being asserted. Only those portions of the testimony that are
8 appropriately designated for protection within the 21 days shall be covered by the provisions of
9 this Protective Order. Alternatively, a Designating Party may specify, at the deposition or up to
10 21 days afterwards, that the entire transcript shall be treated as “CONFIDENTIAL” or “HIGHLY
11 CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

12 Transcripts containing Protected Material shall have an obvious legend on the title page
13 that the transcript contains Protected Material, and the title page shall be followed by a list of all
14 pages (including line numbers as appropriate) that have been designated as Protected Material and
15 the level of protection being asserted by the Designating Party. The Designating Party shall
16 inform the court reporter of these requirements. Any transcript that is prepared before the
17 expiration of a 21-day period for designation shall be treated during that period as if it had been
18 designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” in its entirety unless
19 otherwise agreed. After the expiration of that period, the transcript shall be treated only as
20 actually designated.

21 (c) for information produced in some form other than documentary and for any other
22 tangible items, that the Producing Party affix in a prominent place on the exterior of the container
23 or containers in which the information or item is stored the legend “CONFIDENTIAL,”
24 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL
25 – SOURCE CODE.” If only a portion or portions of the information or item warrant protection,
26 the Producing Party, to the extent practicable, shall identify the protected portion(s) and specify
27 the level of protection being asserted.
28

1 5.3 Inadvertent Failures to Designate. An inadvertent failure to designate qualified
2 information or items does not, standing alone, waive the Designating Party's right to secure
3 protection under this Order for such material. Upon correction of a designation, the Receiving
4 Party must make reasonable efforts to assure that the material is treated in accordance with the
5 provisions of this Order.

6 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

7 6.1 Timing of Challenges. Any Party or Non-Party may challenge a designation of
8 confidentiality at any time. Unless a prompt challenge to a Designating Party's confidentiality
9 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic
10 burdens, or a significant disruption or delay of the litigation, a Party does not waive its right to
11 challenge a confidentiality designation by electing not to mount a challenge promptly after the
12 original designation is disclosed.

13 6.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution
14 process by providing written notice of each designation it is challenging and describing the basis
15 for each challenge. To avoid ambiguity as to whether a challenge has been made, the written
16 notice must recite that the challenge to confidentiality is being made in accordance with this
17 specific paragraph of the Protective Order. The parties shall attempt to resolve each challenge in
18 good faith and must begin the process by conferring directly (in voice to voice dialogue; other
19 forms of communication are not sufficient) within 14 days of the date of service of notice. In
20 conferring, the Challenging Party must explain the basis for its belief that the confidentiality
21 designation was not proper and must give the Designating Party an opportunity to review the
22 designated material, to reconsider the circumstances, and, if no change in designation is offered,
23 to explain the basis for the chosen designation. A Challenging Party may proceed to the next
24 stage of the challenge process only if it has engaged in this meet and confer process first or
25 establishes that the Designating Party is unwilling to participate in the meet and confer process in
26 a timely manner.

27 6.3 Judicial Intervention. If the Parties cannot resolve a challenge without court
28 intervention, the Challenging Party shall file and serve a motion to change the confidentiality

1 under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) within 21
2 days of the initial notice of challenge or within 14 days of the parties agreeing that the meet and
3 confer process will not resolve their dispute, whichever is earlier. Each such motion must be
4 accompanied by a competent declaration affirming that the movant has complied with the meet
5 and confer requirements imposed in the preceding paragraph. Failure by the Challenging Party to
6 make such a motion including the required declaration within 21 days (or 14 days, if applicable)
7 shall automatically waive the confidentiality challenge for each challenged designation. Any
8 motion brought pursuant to this provision must be accompanied by a competent declaration
9 affirming that the movant has complied with the meet and confer requirements imposed by the
10 preceding paragraph.

11 The burden of persuasion in any such challenge proceeding shall be on the Designating
12 Party. Frivolous challenges and those made for an improper purpose (e.g., to harass or impose
13 unnecessary expenses and burdens on other parties) may expose the Challenging Party to
14 sanctions. All parties shall continue to afford the material in question the level of protection to
15 which it is entitled under the Producing Party's designation until the court rules on the challenge.

16 7. ACCESS TO AND USE OF PROTECTED MATERIAL

17 7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or
18 produced by another Party or by a Non-Party in connection with this case only for prosecuting,
19 defending, or attempting to settle this litigation. Such Protected Material may be disclosed only to
20 the categories of persons and under the conditions described in this Order. When the litigation has
21 been terminated, a Receiving Party must comply with the provisions of section 15 below (FINAL
22 DISPOSITION).

23 Protected Material must be stored and maintained by a Receiving Party at a location and
24 in a secure manner that ensures that access is limited to the persons authorized under this Order.

25 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise ordered
26 by the court or permitted in writing by the Designating Party, a Receiving Party may disclose any
27 information or item designated "CONFIDENTIAL" only to:

28 (a) the Receiving Party's Outside Counsel of Record in this action, as well as

1 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the
2 information for this litigation;

3 (b) the officers, directors, and employees (including House Counsel) of the Receiving
4 Party to whom disclosure is reasonably necessary for this litigation and who have signed the
5 “Acknowledgment and Agreement to Be Bound” (Exhibit A);

6 (c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is
7 reasonably necessary for this litigation and who have signed the “Acknowledgment and
8 Agreement to Be Bound” (Exhibit A);

9 (d) the court and its personnel;

10 (e) court reporters and their staff, professional jury or trial consultants, and
11 Professional Vendors to whom disclosure is reasonably necessary for this litigation;

12 (f) during their depositions, witnesses in the action to whom disclosure is reasonably
13 necessary and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A),
14 unless otherwise agreed by the Designating Party or ordered by the court. Pages of transcribed
15 deposition testimony or exhibits to depositions that reveal Protected Material must be separately
16 bound by the court reporter and may not be disclosed to anyone except as permitted under this
17 Protective Order.

18 (g) the author or recipient of a document containing the information or a custodian or
19 other person who otherwise possessed or knew the information.

20 7.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” and
21 “HIGHLY CONFIDENTIAL – SOURCE CODE” Information or Items. Unless otherwise
22 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may
23 disclose any information or item designated “HIGHLY CONFIDENTIAL – ATTORNEYS’
24 EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE” only to:

25 (a) the Receiving Party’s Outside Counsel of Record in this action, as well as
26 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the
27 information for this litigation;

28 (c) Experts of the Receiving Party (1) to whom disclosure is reasonably necessary for

1 this litigation, (2) who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit
2 A), and (3) as to whom the procedures set forth in paragraph 7.4(a)(2), below, have been
3 followed;

4 (d) the court and its personnel;

5 (e) court reporters and their staff, professional jury or trial consultants, and
6 Professional Vendors to whom disclosure is reasonably necessary for this litigation; and

7 (f) the author or recipient of a document containing the information or a custodian or
8 other person who otherwise possessed or knew the information.

9 7.4 Procedures for Approving or Objecting to Disclosure of “HIGHLY CONFIDENTIAL
10 – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE”
11 Information or Items to Designated House Counsel or Experts.

12 (a)(1) Unless otherwise ordered by the court or agreed to in writing by the Designating
13 Party, a Party that seeks to disclose to Designated House Counsel any information or item that has
14 been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” pursuant to
15 paragraph 7.3(b) first must make a written request to the Designating Party that (1) sets forth the
16 full name of the Designated House Counsel and the city and state of his or her residence and (2)
17 describes the Designated House Counsel’s current and reasonably foreseeable future primary job
18 duties and responsibilities in sufficient detail to determine if House Counsel is involved, or may
19 become involved, in any competitive decision-making.

20 (a)(2) Unless otherwise ordered by the court or agreed to in writing by the Designating
21 Party, a Party that seeks to disclose to an Expert (as defined in this Order) any information or item
22 that has been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or
23 “HIGHLY CONFIDENTIAL – SOURCE CODE” pursuant to paragraph 7.3(c) first must make a
24 written request to the Designating Party that (1) identifies the general categories of “HIGHLY
25 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE
26 CODE” information that the Receiving Party seeks permission to disclose to the Expert, (2) sets
27 forth the full name of the Expert and the city and state of his or her primary residence, (3)
28 attaches a copy of the Expert’s current resume, (4) identifies the Expert’s current employer(s), (5)

1 identifies each person or entity from whom the Expert has received compensation or funding for
2 work in his or her areas of expertise or to whom the expert has provided professional services,
3 including in connection with a litigation, at any time during the preceding five years,¹ and (6)
4 identifies (by name and number of the case, filing date, and location of court) any litigation in
5 connection with which the Expert has offered expert testimony, including through a declaration,
6 report, or testimony at a deposition or trial, during the preceding five years.

7 (b) A Party that makes a request and provides the information specified in the
8 preceding respective paragraphs may disclose the subject Protected Material to the identified
9 Designated House Counsel or Expert unless, within 14 days of delivering the request, the Party
10 receives a written objection from the Designating Party. Any such objection must set forth in
11 detail the grounds on which it is based.

12 (c) A Party that receives a timely written objection must meet and confer with the
13 Designating Party (through direct voice to voice dialogue) to try to resolve the matter by
14 agreement within seven days of the written objection. If no agreement is reached, the Party
15 seeking to make the disclosure to Designated House Counsel or the Expert may file a motion as
16 provided in Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable)
17 seeking permission from the court to do so. Any such motion must describe the circumstances
18 with specificity, set forth in detail the reasons why disclosure to Designated House Counsel or the
19 Expert is reasonably necessary, assess the risk of harm that the disclosure would entail, and
20 suggest any additional means that could be used to reduce that risk. In addition, any such motion
21 must be accompanied by a competent declaration describing the parties' efforts to resolve the
22 matter by agreement (i.e., the extent and the content of the meet and confer discussions) and
23 setting forth the reasons advanced by the Designating Party for its refusal to approve the
24 disclosure.

25
26 ¹ If the Expert believes any of this information is subject to a confidentiality obligation to a third-
27 party, then the Expert should provide whatever information the Expert believes can be disclosed
28 without violating any confidentiality agreements, and the Party seeking to disclose to the Expert
shall be available to meet and confer with the Designating Party regarding any such engagement.

1 In any such proceeding, the Party opposing disclosure to Designated House Counsel or
2 the Expert shall bear the burden of proving that the risk of harm that the disclosure would entail
3 (under the safeguards proposed) outweighs the Receiving Party's need to disclose the Protected
4 Material to its Designated House Counsel or Expert.

5 8. PROSECUTION BAR

6 Absent written consent from the Producing Party, any individual who receives
7 access to "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" or "HIGHLY
8 CONFIDENTIAL – SOURCE CODE" information shall not be involved in the prosecution of
9 patents or patent applications relating to the subject matter of this action, including without
10 limitation the patents asserted in this action and any patent or application claiming priority to or
11 otherwise related to the patents asserted in this action, before any foreign or domestic agency,
12 including the United States Patent and Trademark Office ("the Patent Office"). For the purposes
13 of this section, "prosecution" includes any involvement in or advising regarding drafting, editing,
14 approving or amending patent claims. Prosecution includes, for example, original application, or
15 involvement in or advising regarding drafting, editing, approving or amending patent claims in
16 reissue and reexamination proceedings. "Prosecution" as used in this section does not include
17 representing a party challenging a patent before a domestic or foreign agency (including, but not
18 limited to, a reissue protest, *ex parte* reexamination or *inter partes* review). "Prosecution" as used
19 in this section also does not include participation by such individual representing a patent-holder
20 in a reissue protest, *ex parte* reexamination, or *inter partes* review, so long as the proceeding is
21 not initiated by the patent-holder itself for any of its own patents, and so long as the individual
22 has no involvement in and does not advise regarding drafting, editing, approving or amending
23 claim language.² No prohibition set forth in this paragraph shall apply to or result from any
24 Protected Materials that such individual had lawfully received or authored prior to and apart from
25

26 ² Such individual may be involved in other activities such as reviewing, drafting or editing briefs,
27 correspondence, or other materials in any reissue protest, *ex parte* reexamination, or *inter partes*
28 review, so long as the individual has no involvement in and does not advise regarding drafting,
editing, approving or amending claim language.

1 this litigation, or to any other material not covered by this Stipulated Protective Order. This
2 Prosecution Bar shall begin when access to “HIGHLY CONFIDENTIAL – ATTORNEYS’
3 EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE” information is first received
4 by the affected individual and shall end two (2) years after final termination of this action.

5 9. SOURCE CODE

6 (a) To the extent production of source code becomes necessary in this case, a
7 Producing Party may designate source code as “HIGHLY CONFIDENTIAL – SOURCE CODE”
8 if it comprises or includes confidential, proprietary or trade secret source code.

9 (b) Protected Material designated as “HIGHLY CONFIDENTIAL – SOURCE
10 CODE” shall be subject to all of the protections afforded to “HIGHLY CONFIDENTIAL –
11 ATTORNEYS’ EYES ONLY” information, including the Prosecution Bar set forth in Paragraph
12 8, and may be disclosed only to the individuals to whom “HIGHLY CONFIDENTIAL –
13 ATTORNEYS’ EYES ONLY” information may be disclosed, as set forth in Paragraphs 7.3 and
14 7.4, with the exception of Designated House Counsel.

15 (c) Any source code produced in discovery shall be made available for inspection, in a
16 format allowing it to be reasonably reviewed and searched, during normal business hours or at
17 other mutually agreeable times, at an office of the Producing Party’s counsel or another mutually
18 agreed upon location. The source code shall be made available for inspection on a secured
19 computer in a secured room without Internet access or network access to other computers, and the
20 Receiving Party shall not copy, remove, or otherwise transfer any portion of the source code onto
21 any recordable media or recordable device. The Producing Party may visually monitor the
22 activities of the Receiving Party’s representatives during any source code review, but only to
23 ensure that there is no unauthorized recording, copying, or transmission of the source code.

24 (d) The Receiving Party may request paper copies of limited portions of source code
25 that are reasonably necessary for the preparation of court filings, pleadings, expert reports, or
26 other papers, or for deposition or trial, but shall not request paper copies for the purpose of
27 reviewing the source code other than electronically as set forth in paragraph (c) in the first
28 instance. Such limited portions of Source Code shall not exceed 25 contiguous printed pages, or

1 an aggregate total of more than 350 pages, of Source Code during the duration of the case,
2 without prior consent from the Producing Party or further order of the Court. The Producing
3 Party shall provide all such source code in paper form, including bates numbers and the label
4 “HIGHLY CONFIDENTIAL – SOURCE CODE.” The Producing Party may challenge the
5 amount of source code requested in hard copy form pursuant to the dispute resolution procedure
6 and timeframes set forth in Paragraph 6 whereby the Producing Party is the “Challenging Party”
7 and the Receiving Party is the “Designating Party” for purposes of dispute resolution.

8 (e) The Receiving Party shall maintain a record of any individual who has inspected
9 any portion of the source code in electronic or paper form. The Receiving Party shall maintain all
10 paper copies of any printed portions of the source code in a secured, locked area within offices of
11 the Receiving Party’s Outside Counsel of Record in this District. The Receiving Party shall not
12 create any electronic or other images of the paper copies and shall not convert any of the
13 information contained in the paper copies into any electronic format. The Receiving Party shall
14 only make additional paper copies if such additional copies are (1) necessary to prepare court
15 filings, pleadings, or other papers (including a testifying expert’s expert report), (2) necessary for
16 deposition, or (3) otherwise necessary for the preparation of its case. Any paper copies used
17 during a deposition shall be retrieved by the Producing Party at the end of each day and must not
18 be given to or left with a court reporter or any other unauthorized individual.

19 10. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER
20 LITIGATION

21 If a Party is served with a subpoena or a court order issued in other litigation that compels
22 disclosure of any information or items designated in this action as “CONFIDENTIAL,”
23 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL
24 – SOURCE CODE,” that Party must:

25 (a) promptly notify in writing the Designating Party. Such notification shall include a
26 copy of the subpoena or court order;

27 (b) promptly notify in writing the party who caused the subpoena or order to issue in
28 the other litigation that some or all of the material covered by the subpoena or order is subject to

1 this Protective Order. Such notification shall include a copy of this Protective Order; and

2 (c) cooperate with respect to all reasonable procedures sought to be pursued by the
3 Designating Party whose Protected Material may be affected.³

4 If the Designating Party timely seeks a protective order, the Party served with the
5 subpoena or court order shall not produce any information designated in this action as
6 “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” or
7 “HIGHLY CONFIDENTIAL – SOURCE CODE” before a determination by the court from
8 which the subpoena or order issued, unless the Party has obtained the Designating Party’s
9 permission. The Designating Party shall bear the burden and expense of seeking protection in that
10 court of its confidential material – and nothing in these provisions should be construed as
11 authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from
12 another court.

13 11. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN THIS
14 LITIGATION

15 (a) The terms of this Order are applicable to information produced by a Non-Party in
16 this action and designated as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL –
17 ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE CODE.” Such
18 information produced by Non-Parties in connection with this litigation is protected by the
19 remedies and relief provided by this Order. Nothing in these provisions should be construed as
20 prohibiting a Non-Party from seeking additional protections.

21 (b) In the event that a Party is required, by a valid discovery request, to produce a
22 Non-Party’s confidential information in its possession, and the Party is subject to an agreement
23 with the Non-Party not to produce the Non-Party’s confidential information, then the Party shall:

24 1. promptly notify in writing the Requesting Party and the Non-Party that
25 some or all of the information requested is subject to a confidentiality agreement with a Non-

26 ³ The purpose of imposing these duties is to alert the interested parties to the existence of this
27 Protective Order and to afford the Designating Party in this case an opportunity to try to protect
28 its confidentiality interests in the court from which the subpoena or order issued.

1 Party;

2 2. promptly provide the Non-Party with a copy of the Protective Order in this
3 litigation, the relevant discovery request(s), and a reasonably specific description of the
4 information requested; and

5 3. make the information requested available for inspection by the Non-Party.

6 (c) If the Non-Party fails to object or seek a protective order from this court within 14
7 days of receiving the notice and accompanying information, the Receiving Party may produce the
8 Non-Party's confidential information responsive to the discovery request. If the Non-Party timely
9 seeks a protective order, the Receiving Party shall not produce any information in its possession
10 or control that is subject to the confidentiality agreement with the Non-Party before a
11 determination by the court.⁴ Absent a court order to the contrary, the Non-Party shall bear the
12 burden and expense of seeking protection in this court of its Protected Material.

13 12. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

14 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected
15 Material to any person or in any circumstance not authorized under this Protective Order, the
16 Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized
17 disclosures, (b) use its best efforts to retrieve all unauthorized copies of the Protected Material, (c)
18 inform the person or persons to whom unauthorized disclosures were made of all the terms of this
19 Order, and (d) request such person or persons to execute the "Acknowledgment and Agreement to
20 Be Bound" that is attached hereto as Exhibit A.

21 13. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED
22 MATERIAL

23 When a Producing Party gives notice to Receiving Parties that certain inadvertently
24 produced material is subject to a claim of privilege or other protection, the obligations of the
25 Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This

26 _____
27 ⁴ The purpose of this provision is to alert the interested parties to the existence of confidentiality
28 rights of a Non-Party and to afford the Non-Party an opportunity to protect its confidentiality
interests in this court.

1 provision is not intended to modify whatever procedure may be established in an e-discovery
2 order that provides for production without prior privilege review. Pursuant to Federal Rule of
3 Evidence 502(d) and (e), insofar as the parties reach an agreement on the effect of disclosure of a
4 communication or information covered by the attorney-client privilege or work product
5 protection, the parties may incorporate their agreement in a stipulated protective order submitted
6 to the court.

7 14. MISCELLANEOUS

8 14.1 Right to Further Relief. Nothing in this Order abridges the right of any person to
9 seek its modification by the court in the future.

10 14.2 Right to Assert Other Objections. No Party waives any right it otherwise would
11 have to object to disclosing or producing any information or item on any ground not addressed in
12 this Protective Order. Similarly, no Party waives any right to object on any ground to use in
13 evidence of any of the material covered by this Protective Order.

14 14.3 Export Control. Disclosure of Protected Material shall be subject to all applicable
15 laws and regulations relating to the export of technical data contained in such Protected Material,
16 including the release of such technical data to foreign persons or nationals in the United States or
17 elsewhere. The Producing Party shall be responsible for identifying any such controlled technical
18 data, and the Receiving Party shall take measures necessary to ensure compliance.

19 14.4 Filing Protected Material. Without written permission from the Designating Party
20 or a court order secured after appropriate notice to all interested persons, a Party may not file in
21 the public record in this action any Protected Material. A Party that seeks to file under seal any
22 Protected Material must comply with Civil Local Rule 79-5. Protected Material may only be filed
23 under seal pursuant to a court order authorizing the sealing of the specific Protected Material at
24 issue. Pursuant to Civil Local Rule 79-5, a sealing order will issue only upon a request
25 establishing that the Protected Material at issue is privileged, protectable as a trade secret, or
26 otherwise entitled to protection under the law. If a Receiving Party's request to file Protected
27 Material under seal pursuant to Civil Local Rule 79-5(e) is denied by the court, then the
28 Receiving Party may file the Protected Material in the public record pursuant to Civil Local Rule

1 79-5(e)(2) unless otherwise instructed by the court.

2 15. FINAL DISPOSITION

3 Within 60 days after the final disposition of this action, as defined in paragraph 4, each
4 Receiving Party must return all Protected Material to the Producing Party or destroy such
5 material. As used in this subdivision, “all Protected Material” includes all copies, abstracts,
6 compilations, summaries, and any other format reproducing or capturing any of the Protected
7 Material. Whether the Protected Material is returned or destroyed, the Receiving Party must
8 submit a written certification to the Producing Party (and, if not the same person or entity, to the
9 Designating Party) by the 60 day deadline that (1) identifies (by category, where appropriate) all
10 the Protected Material that was returned or destroyed and (2) affirms that the Receiving Party has
11 not retained any copies, abstracts, compilations, summaries or any other format reproducing or
12 capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to
13 retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts,
14 legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work
15 product, and consultant and expert work product, even if such materials contain Protected
16 Material. Any such archival copies that contain or constitute Protected Material remain subject to
17 this Protective Order as set forth in Section 4 (DURATION).

18 ///

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Respectfully submitted,

DATED: June 18, 2018

By: /s/ Austin Manes

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Respectfully submitted,

DATED: June 18, 2018

By: /s/ Andrew L. Perito

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ATTESTATION

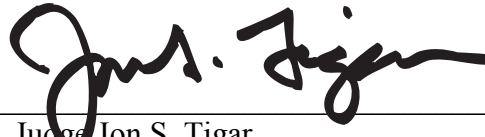
In accordance with Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has been obtained from any other signatory to this document.

By: /s/ Austin Manes

Austin Manes (State Bar No. 284065)

1 IT IS SO ORDERED.

2
3
4 DATED: June 19, 2018



Judge Jon S. Tigar
United States District/Magistrate Judge

1 EXHIBIT A

2 ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

3 I, _____ [print or type full name], of
4 _____ [print or type full address], declare under penalty of perjury that I have read
5 in its entirety and understand the Protective Order that was issued by the United States District
6 Court for the Northern District of California on _____ [date] in the case of _____
7 **[insert formal name of the case and the number and initials assigned to it by the court]**. I
8 agree to comply with and to be bound by all the terms of this Protective Order, and I understand
9 and acknowledge that failure to so comply could expose me to sanctions and punishment in the
10 nature of contempt. I solemnly promise that I will not disclose in any manner any information or
11 item that is subject to this Protective Order to any person or entity except in strict compliance
12 with the provisions of this Order.

13 I further agree to submit to the jurisdiction of the United States District Court for
14 the Northern District of California for the purpose of enforcing the terms of this Protective Order,
15 even if such enforcement proceedings occur after termination of this action.

16 I hereby appoint _____ [print or type full name] of
17 _____ [print or type full address and telephone
18 number] as my California agent for service of process in connection with this action or any
19 proceedings related to enforcement of this Protective Order.

20
21 Date: _____

22 City and State where sworn and signed: _____

23 Printed name: _____
24 [printed name]

25 Signature: _____
26 [signature]